In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1796

MARY JANE R. JAMES, Administratrix
of the Estate of Howard James,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	
I. This Case Presents an Important Question of Construction of the Federal Tort Claims Act.	4
II. This Case Presents an Important Question as to the Continuing Validity of the Doctrine of Sovereign Immunity of the United States.	8
Conclusion	14
Appendix A — Opinions of Court of Appeals	A-1, A-9
Opinions of District Court	A3-, A-11
Appendix B — Constitutional and Statutory Provisions Involved	A-24

Table of Citations

Cases

Archer v. *United States*, 217 F.2d 548 (9th Cir. 1954), *cert. denied*, 348 U.S. 953 (1955)	7
Ayala v. *Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877 (1973)	10, 11
Bailey v. *DeQuevedo*, 375 F.2d 72 (3d Cir.), *cert. denied*, 389 U.S. 923 (1967)	7
Barker v. *City of Santa Fe*, 47 N.M. 85, 136 P.2d 480 (1943)	11
Barnes v. *United States*, 103 F. Supp. 51 (W.D.Ky. 1952)	7

Page

Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) 8, 9, 13
Board of Comm'rs of the Port of New Orleans v. *Splendor Shipping & Enterprise Co.*, 273 So.2d 19 (La. 1973) 10, 11
Brooks v. *United States*, 337 U.S. 49 (1949) 6
Brown v. *City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968) 10, 11
Brown v. *United States*, 99 F. Supp. 685 (S.D.W.Va. 1951) 7
Buckingham v. *United States*, 394 F.2d 483 (4th Cir. 1968) 7
Callaway v. *Garber*, 289 F.2d 171 (9th Cir.), *cert. denied*, 368 U.S. 874 (1961) 7
Campbell v. *Indiana*, 259 Ind. 55, 284 N.E.2d 733 (1972) 11
Chambers v. *United States*, 357 F.2d 224 (8th Cir. 1966) 7
Evans v. *Board of County Comm'rs*, 174 Colo. 97, 482 P.2d 968 (1971) 10
Fass v. *United States*, 191 F. Supp. 367 (E.D.N.Y. 1961) 7
Feres v. *United States*, 340 U.S. 135 (1950) .. 3, 4, 5, 6, 8
Gursley v. *United States*, 232 F. Supp. 614 (D. Colo. 1964) 7
Hale v. *United States*, 416 F.2d 355 (6th Cir. 1969) ... 7, 8
Hand v. *United States*, 260 F. Supp. 38 (M.D.Ga. 1966) 7
Haney v. *Lexington*, 386 S.W.2d 738 (Ky. 1965) 11
Holytz v. *City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) 10, 11
Homlitas v. *United States*, 202 F. Supp. 520 (D.Ore. 1962) 7
Indian Towing Co. v. *United States*, 350 U.S. 61 (1955) 5
J. I. Case v. *Borak*, 377 U.S. 426 (1964) 13
Knoch v. *United States*, 316 F.2d 532 (9th Cir. 1963) 7

Page

Molitor v. *Kaneland Community Unit District No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960) 10, 11
Muskopf v. *Corning Hospital District*, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961) 10, 11
National Bank v. *Republic of China*, 348 U.S. 356 (1955) 9
Preferred Insurance Co. v. *United States*, 222 F.2d 942 (9th Cir.), *cert. denied*, 350 U.S. 837 (1955) 7
Proffit v. *Colorado*, 174 Colo. 113, 482 P.2d 965 (1971) 10, 11
Rayonier, Inc. v. *United States*, 352 U.S. 315 (1957) 5, 6
Richardson v. *United States*, 226 F. Supp. 49 (E.D.Va. 1964) 7
Sapp v. *United States*, 153 F. Supp. 496 (W.D.La. 1957) 7
Scheele v. *Anchorage*, 385 P.2d 582 (Alas. 1963) 11
Smith v. *Idaho*, 93 Idaho 795, 473 P.2d 937 (1970) ... 11
Snyder v. *United States*, 118 F. Supp. 585 (D.Md. 1953), *modified sub. nom., United States* v. *Guyer*, 218 F.2d 266 (4th Cir. 1954), *rev'd per curiam* and District Court opinion reinstated, 350 U.S. 906 (1955) 7
Spencer v. *General Hospital of District of Columbia*, 425 F.2d 479 (D.C. Cir. 1969) 11
Stone v. *Arizona Highway Commission*, 93 Ariz. 384, 381 P.2d 107 (1963) 11
United States v. *Brown*, 348 U.S. 110 (1954) 6
United States v. *Carroll*, 369 F.2d 618 (8th Cir. 1966) 7
United States v. *Lee*, 400 F.2d 558 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053 (1969) 7
United States v. *Lee*, 106 U.S. 196 (1882) 9
United States v. *Muniz*, 374 U.S. 150 (1963) 6
Williams v. *City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961) 10, 11
Zoula v. *United States*, 217 F.2d 81 (5th Cir. 1955) .. 7

Statutes

	Page
28 U.S.C. § 1254(1)	2
§ 1331	4
§ 1346	3
§ 2674	2, 3
§ 2680	6

Constitutional Provisions

United States Constitution	
Fourth Amendment	2, 3, 4
Fifth Amendment	2, 3, 4, 13
Eighth Amendment	2, 3, 4

In the Supreme Court of the United States

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No.

MARY JANE R. JAMES, Administratrix
of the Estate of Howard James,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Mary Jane R. James, prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the First Circuit entered on March 16, 1976.

Opinions Below

The Opinions of the Court of Appeals entered on March 16, 1976 (noted at 530 F.2d 926) and of the District Court, entered on August 14, 1975, respectively, are not officially

reported, but are reproduced in Appendix A to this Petition, beginning at page A-1, *infra.* The earlier Opinion of the Court of Appeals (noted at 502 F.2d 1159) is not officially reported, and that Opinion as well as the earlier Opinion of the District Court reported at 358 F. Supp. 1381 (D.R.I. 1973) are reproduced in Appendix A hereto.

Jurisdiction

The Opinion of the Court of Appeals was entered on March 16, 1976. This Court has jurisdiction to review the same by Writ of Certiorari under 28 U.S.C. § 1254(1).

Questions Presented

1. May recovery be had under the Federal Tort Claims Act by the estate of a deceased serviceman, where the serviceman, while on leave and in civilian clothing at his base, was wrongfully beaten to death by a military security guard?

2. Is the doctrine of sovereign immunity to be applied to bar a claim against the United States for damages resulting from violation of rights secured by the Fourth, Fifth and Eighth Amendments to the United States Constitution?

Constitutional Provisions and Statutes Involved

The Constitutional provisions involved are the Fourth, Fifth and Eighth Amendments to the United States Constitution. The statute involved is 28 U.S.C. § 2674. The Constitutional Amendments and the statute are reprinted in Appendix B hereto.

Statement of the Case

Howard James ("James") was a serviceman in the United States Navy, stationed at the naval base in Quonset Point, Rhode Island. On August 14, 1969, James, while on leave and in civilian dress, was arrested on the base for disorderly conduct. He was taken to the guard house and was to be transported to the base dispensary for a sobriety test.

While James was in the guard house, a naval security guard struck him repeatedly on the head with a night stick. The evidence showed that after James had fallen to the floor, the security guard, using his foot, stomped repeatedly on James' head. Two other naval security guards were present throughout this episode. The trial judge found (at 358 F. Supp. 1383-84) that the guard striking James "used unreasonable and excessive force in subduing James", and that one of the other guards present "could have stopped or mitigated [the] blows after the second blow," but did not do so out of deference to a ranking officer. The Navy gave no specialized training to these guards, nor did the Navy make any effort to screen personnel best suited for such duty. James died two days later as a result of the injuries inflicted.

Petitioner, as administratrix of the Estate of Howard James, brought an action against respondent for the wrongful death of James, seeking recovery under the Federal Tort Claims Act, 28 U.S.C. § 2674; 28 U.S.C. § 1346 provides for jurisdiction of such claim. The District Court entered a judgment for the respondent, holding recovery was precluded by the case of *Feres* v. *United States,* 340 U.S. 135 (1950) and refusing to consider any claims based on the alleged deprivation of James' rights under the Fourth, Fifth and Eighth Amendments to the United States Constitution. The Court also denied peti-

tioner's post-judgment motion to amend her complaint so as to expressly allege such claims and jurisdiction of the same under 28 U.S.C. § 1331. Petitioner appealed to the United States Court of Appeals for the First Circuit. The Court of Appeals (on the first appeal of the case) considered only the District Court's refusal to grant petitioner's motion to amend the complaint so as to expressly include allegations as to violation of James' Fourth, Fifth and Eighth Amendment rights; the Court of Appeals reversed the District Court's ruling on petitioner's motion to amend, and remanded the case for "the limited purpose of completing the record by allowing the amendment to the complaint, taking any additional evidence germane to the issues raised thereby, and making such factual findings and legal conclusions as the Court deems appropriate."

On remand, the record was not reopened, both parties choosing to rest on the earlier proceedings. The District Court thereupon held that the doctrine of sovereign immunity was a complete bar to petitioner's action based upon James' deprivation of his Constitutional rights, as set forth in the amended complaint. Petitioner again appealed to the Court of Appeals for the First Circuit. The Court of Appeals sustained the judgment of the District Court, thereby affirming the District Court's determination that petitioner could not recover under the Federal Tort Claims Act and that the doctrine of sovereign immunity barred recovery for violation of James' Fourth, Fifth and Eighth Amendment rights.

Reasons for Granting the Writ

I. This Case Presents an Important Question as to the Construction of the Federal Tort Claims Act.

Based on this Court's holding in *Feres* v. *United States*, 340 U.S. 135 (1950), the Circuit Court concluded that

petitioner could not recover under the Federal Tort Claims Act ("FTCA"). In *Feres*, at 340 U.S. 146, this Court held:

> We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.

Since the enunciation of the *Feres* doctrine, subsequent opinions of this Court have rejected the theoretical underpinnings of the doctrine, thereby warranting re-examination of the *Feres* holding.

The *Feres* holding was premised on four major factors: 1) the absence of analogous private liability in similar circumstances; 2) the relationship of the serviceman to his superiors and to the Government, and the effect on military discipline of civil actions by a serviceman for the negligence of another serviceman; 3) the diversity of results as determined by local law; and 4) the existence of a uniform compensation system as a remedy for injuries.

The premise that in the absence of analogous private liability recovery is barred against the Government was rejected in *Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957) and *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). The "unique" relationship and discipline

postulates were faced by this Court and implicitly rejected as dispositive of Governmental liability in *United States* v. *Muniz*, 374 U.S. 150 (1963). In *Muniz* the vagaries of local law were also rejected as a basis for denial of recovery. Finally, the existence of an alternate compensation system did not bar claims under the FTCA in cases decided both before and after *Feres; See Brooks* v. *United States*, 337 U.S. 49 (1949) and *United States* v. *Brown*, 348 U.S. 110 (1954).

Two years after this Court, in *Feres*, read an exception into the FTCA by implication, it commented in *Rayonier, Inc.* v. *United States, supra*, at 352 U.S. 320:

> There is no justification for this Court to read exceptions into the Act beyond those provided by Congress. If the Act is to be altered, that is the function for the same body that adopted it.

See also, Muniz v. *United States, supra*, at 374 U.S. 166. (It should be noted that the FTCA has one express exception specifically relating to the military and two express exceptions which may relate to the military, none of which is applicable to this case. *See* 28 U.S.C. § 2680(j), 28 U.S.C. § 2680(a) and 28 U.S.C. § 2680(k).)

Petitioner submits that in the light of these decisions, re-examination of *Feres* is warranted.

Even if this Court chooses not to re-examine the *Feres* doctrine fully, the very ambiguity of the language used therein calls for interpretation and clarification by this Court.

While the *Feres* case employed the phrase "incident to [military] service", other decisions of this Court have employed the phrase "in the course of military duty" as the standard for determining whether the Federal Tort Claims Act exclusion applies. *E.g., United States* v. *Brown, supra.* Courts have pointed out that these

phrases are not identical. *E.g., Hale* v. *United States*, 416 F.2d 355 (6th Cir. 1969); *United States* v. *Carroll*, 369 F.2d 618, 622 (8th Cir. 1966). And the court, in *Hale* v. *United States, supra* at 416 F.2d 359 pointed to a lengthy list of cases illustrating the confusion as to the proper standard to be applied. For example, the following cases applied the "line of duty" standard: *Buckingham* v. *United States*, 394 F.2d 483 (4th Cir. 1968); *Bailey* v. *DeQuevedo*, 375 F.2d 72 (3d Cir.), *cert. denied*, 389 U.S. 923 (1967); *Archer* v. *United States*, 217 F.2d 548 (9th Cir. 1954), *cert. denied*, 348 U.S. 953 (1955); *Brown* v. *United States*, 99 F. Supp. 685 (S.D.W.Va. 1951).

The following cases applied the "incident to service" standard: *United States* v. *Carroll*, 369 F.2d 618 (8th Cir. 1966); *Chambers* v. *United States*, 357 F.2d 224 (8th Cir. 1966); *Preferred Insurance Co.* v. *United States*, 222 F.2d 942 (9th Cir.), *cert. denied*, 350 U.S. 837 (1955); *Zoula* v. *United States*, 217 F.2d 81 (5th Cir. 1955); *Gursley* v. *United States*, 232 F. Supp. 614 (D.Colo. 1964); *Richardson* v. *United States*, 226 F. Supp. 49 (E.D.Va. 1964); *Homlitas* v. *United States*, 202 F. Supp. 520 (D.Ore. 1962); *Sapp* v. *United States*, 153 F. Supp. 496 (W.D.La. 1957); *Barnes* v. *United States*, 103 F. Supp. 51 (W.D.Ky. 1952).

And the following cases employed both standards in reaching a determination: *United States* v. *Lee*, 400 F.2d 558 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053 (1969); *Knoch* v. *United States*, 316 F.2d 532 (9th Cir. 1963); *Callaway* v. *Garber*, 289 F.2d 171 (9th Cir.), *cert. denied*, 368 U.S. 874 (1961); *Hand* v. *United States*, 260 F. Supp. 38 (M.D.Ga. 1966); *Fass* v. *United States*, 191 F. Supp. 367 (E.D.N.Y. 1961); *Snyder* v. *United States*, 118 F. Supp. 585 (D.Md. 1953), *modified sub. nom., United States* v. *Guyer*, 218 F.2d 266 (4th Cir. 1954), *rev'd per curiam* and District Court opinion reinstated, 350 U.S. 906 (1955).

Moreover, the difficulties inherent in the *Feres* standard ("incident to service") were succinctly stated in *Hale* v. *United States, supra,* at 416 F.2d 358:

> The standard "incident to military service" has many deficiencies as a basis for exclusion under the Federal Tort Claims Act as other courts have pointed out. It is so lacking in precision that the mere fact that the plaintiff was in military service at the time of the accident can provide a logical basis for the government's arguing for exclusion of the person concerned on a *post hoc, ergo propter hoc* basis. See, e.g., *Knecht* v. *United States,* 144 F. Supp. 786, 789 (E.D. Pa. 1956), *aff'd,* 242 F.2d 929 (3d Cir. 1957). Clearly, for example, the plaintiffs in *Brooks* v. *United States,* 337 U.S. 49, 69 S. Ct. 918, 93 L. Ed. 1200 (1949), and *United States* v. *Brown,* 348 U.S. 110, 75 S. Ct. 141, 99 L. Ed. 139 (1954), would not have been where they were at the time the injuries to each of them took place except for the fact that they were in or had been in military service.

It is submitted that at a minimum this Court should review the *Feres* doctrine and explore the limits thereof, and clarify the standard to be applied in determining the circumstances under which a serviceman can maintain an action under the FTCA.

II. This Case Presents an Important Question as to the Continuing Validity of the Doctrine of Sovereign Immunity of the United States.

In *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971), this Court held that violation of a person's Constitutional rights gives rise to a cause of action in tort for

money damages, maintainable against the federal officer(s) who violated those rights. Left unsettled by *Bivens* is whether an action for tortious violation of Constitutional rights by a federal officer can be successfully maintained against the United States itself on the theory of *respondeat superior. Bivens* makes clear the existence of a tort; however, unless the doctrine of sovereign immunity is abrogated, a claim against the United States cannot be maintained for violation of the rights recognized in *Bivens.*

The doctrine of sovereign immunity with respect to the federal government finds its hoary origins as early as the case of *United States* v. *Lee,* 106 U.S. 196 (1882), where the doctrine was accepted without analysis. This Court, in recent years, has not scrutinized the doctrine of sovereign immunity in the context presented by the instant petition. However, in *National Bank* v. *Republic of China,* 348 U.S. 356 (1955), this Court commented (at 348 U.S. 359-60):

> But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. A reflection of this steady shift in attitude toward the American sovereign's immunity is found in such observations in unanimous opinions of this Court as "Public opinion as to the peculiar rights and preferences due to the sovereign has changed". *Davis* v. *Pringle,* 268 U.S. 315, 318; "There is no doubt an intermittent tendency on the part of governments to be a little less grasping than they have been in the past . . . , " *White* v. *Mechanics Securities Corp.,* 269 U.S. 283, 301; ". . . the present climate

of opinion . . . has brought governmental immunity from suit into disfavor . . . ," *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 391 . . . .

The outlook and feeling thus reflected are not merely relevant to our problem. They are important. The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in lawmaking by courts. Legislation and adjudication are inter-acting influences in the development of law. A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process. See James M. Landis, Statutes and the Sources of Law, in Harvard Legal Essays (1934), p. 213 *et seq.*; Harlan F. Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 13-16.

The sentiments expressed by this Court are in keeping with the modern view that sovereign immunity is a disfavored anachronism. The doctrine of sovereign immunity, and its derivative companion of governmental immunity (the latter being applicable to municipalities or governmental entities as well as the state itself), have been sharply criticized in recent years. *E.g., Board of Comm'rs of the Port of New Orleans* v. *Splendor Shipping & Enterprise Co.*, 273 So.2d 19 (La. 1973); *Ayala* v. *Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877 (1973); *Proffit* v. *Colorado*, 174 Colo. 113, 482 P.2d 965 (1971); *Evans* v. *Board of County Comm'rs*, 174 Colo. 97, 482 P.2d 968 (1971); *Brown* v. *City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968); *Holytz* v. *City of Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962); *Muskopf* v. *Corning Hospital District*, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961) (Opinion of Traynor, C.J.); *Williams* v. *City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); *Molitor* v. *Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960); *Barker* v. *City of Santa Fe*, 47 N.M. 85, 136 P.2d 480 (1943).

Thus, in a number of states, courts, to varying degrees, have undertaken to judicially abolish the sovereign immunity historically afforded to the state or the governmental immunity historically afforded to municipalities and other governmental entities. *E.g., Board of Comm'rs of the Port of New Orleans* v. *Splendor Shipping & Enterprise Co., supra,* (La.); *Ayala* v. *Philadelphia Board of Public Education, supra,* (Pa.); *Campbell* v. *Indiana*, 259 Ind. 55, 284 N.E.2d 733 (1972); *Proffit* v. *Colorado, supra,* (Colo.); *Smith* v. *Idaho*, 93 Idaho 795, 473 P.2d 937 (1970); *Brown* v. *Omaha, supra,* (Neb.); *Haney* v. *Lexington*, 386 S.W.2d 738 (Ky. 1965); *Scheele* v. *Anchorage*, 385 P.2d 582 (Alas. 1963); *Stone* v. *Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963); *Holytz* v. *Milwaukee, supra,* (Wis.); *Muskopf* v. *Corning Hospital District, supra,* (Cal.); *Williams* v. *City of Detroit, supra,* (Mich.); *Molitor* v. *Kaneland Community Unit District No. 302, supra,* (Ill.); *Barker* v. *City of Santa Fe, supra,* (N.M.).

Also worthy of note is *Spencer* v. *General Hospital of District of Columbia*, 425 F.2d 479 (D.C. Cir. 1969). Therein the court abolished the concept of sovereign immunity as it applied to the District of Columbia. In his concurring opinion, Judge Wright wrote:

> Dissatisfaction with the law of municipal immunity does not rest solely on the illogic of the distinctions made in the area. It stems further from discontent with the whole concept of a broad sovereign immunity in tort, whether of local, state or national government. Few doctrines in the law have sustained such voluminous, searching and almost unanimous attack as

the principle that governments should not respond in damages for their torts. The principle has been examined and found without basis in history properly interpreted, in political theory, or in sound public policy.

The notion that government immunity in tort properly derives from the English common law principle that "the King can do no wrong" has been shown to rest on an erroneous reading of history. The notion that public funds are not collected for the purpose of redressing official wrongdoing, and hence cannot be expended for that purpose, rests on the same circular and specious logic which has been rejected by the courts in the area of charitable immunity. And finally the bald policy conclusion that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience" runs counter to both the traditional tort principle that *vis-a-vis* the innocent victim the wrongdoer should pay, and modern tort concepts of risk distribution and cost allocation.

When in the course of performing their functions governments lawfully acquire goods and services, they are expected to pay the costs. No one has ever given an adequate argument why the same governments should not *a fortiori* pay the costs when in performing the same functions they wrongfully injure innocent people.

The doctrines of sovereign and municipal immunity were made by judges as part of the common law. Legislatures have generally not imposed immunity; rather they have more often limited it in piecemeal fashion where it was felt to be particularly egregious or impolitic. However, it is only since 1955 — the date of *Calomeris* — that courts have stopped be-

> moaning the bad doctrines which they created in the first place, and have begun the serious task of reforming them. In the last decade, the highest courts of at least 12 states have broadly abrogated the immunity in tort of the cities or the states or both. In fewer states have the traditional immunities been explicitly reaffirmed. [At 425 F.2d, 479, 486-88 (Wright, J., concurring); footnotes omitted.]

In rendering his decision in the case at bar, District Court Judge Raymond J. Pettine quoted from the Magna Carta, Clause 39:

> No man shall be in any sort destroyed unless it be by the verdict of his equals, or according to the law of the land.

The Judge commented that it would be ironic if this Court was able to imply remedies for violation of statutory rights (citing *J. I. Case* v. *Borak,* 377 U.S. 426 (1964)), but unable to provide an ordinary judicial remedy for invasion of rights protected by the Supreme law of the land, the Constitution. Indeed, the language used by courts who have criticized the doctrine of sovereign immunity, strongly suggests the doctrine itself is violative of the Fifth Amendment to the United States Constitution.

In view of this Court's recognition, in *Bivens,* of the existence of a cause of action for a "constitutional tort", in view of the repudiation of the doctrines of sovereign and governmental immunity by the overwhelming majority of recent court opinions and in view of the fact that this Court has not passed on the issue of sovereign immunity of the United States in recent years, petitioner submits that issuance of a writ of certiorari is warranted in the case at bar.

Conclusion

For the foregoing reasons, petitioners urge that the petition for a writ of certiorari be granted.

Respectfully submitted,

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June 8, 1976

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 75-1430

MARY JANE JAMES, ADMINISTRATRIX,
OF THE ESTATE OF HOWARD JAMES,
PLAINTIFF, APPELLANT,
v.
UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*

MEMORANDUM AND ORDER
Entered March 16, 1976

PER CURIAM. This is basically a Federal Tort Claims action for wrongful death brought by the estate of Howard James, a sailor on active duty in the United States Navy, who died following blows received from a security guard while in custody and apparently requiring to be subdued. The district court, after a full trial, dismissed the complaint for failure to establish a cause of action, primarily on the basis of *Feres* v. *United States,* 1950, 340 U.S. 135. On a prior appeal, plaintiff complained that the district court had failed to pass on all her factual and legal contentions, and asserted that she wished at least to seek review by the Supreme Court in light of *Bivens* v. *Six Unknown Agents,* 1971, 403 U.S. 388. She stated that for this purpose she would be in a better position with an amended complaint and more factual findings. Not wishing there to be

formal obstacles in her attempt to obtain review, we remanded to the district court,

> "... for the limited purpose of completing the record, by allowing the amendment to the complaint, taking any additional evidence germane to the issues raised thereby, and making such factual findings and legal conclusions as the court deems appropriate."

On remand, plaintiff was permitted to amend, declined to offer further evidence, and sought further findings. This last the court refused to do, holding it unnecessary, since plaintiff's factual contentions could not establish liability of any sort.

No useful purpose would be served by a discussion of the record by us, or by a further remand. We agree with the district court's conclusions, except its comment that the principle recognized by *Feres* is unjust. How best to handle the complexities of conducting the Armed Services is purely a legislative matter.

The judgment of the district court is affirmed.

By the Court:

(s) DANA H. GALLUP
Clerk

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 4670

MARY JANE R. JAMES, Administratrix of the Estate of HOWARD HARRISON JAMES, JR.

v.

UNITED STATES OF AMERICA

MEMORANDUM OPINION

PETTINE, *Chief Judge*

This non-jury death action is now before the Court on remand from the First Circuit, *James* v. *United States*, 502 F2d 1159 (1st Cir. 1973), vacating 359 F.Supp. 1381 (hereinafter "James I", references by page number only) so as to allow the plaintiff to amend her complaint by adding a count alleging a violation of the deceased's constitutional rights and to permit the court to make further findings of fact and conclusions of law as thereby required. The record has not been reopened, both sides choosing to rest on the earlier proceedings and legal argument to the Court. The matter is thus ripe for determination on the merits.

In "James I" the Court, after concluding that the Supreme Court's ruling in *Feres* v. *United States*, 340 U.S. 135 (1950), barred recovery by the plaintiff under the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.*, raised the question as to whether the concept of a constitutional Tort as analyzed in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), would provide a remedy herein. 358 F.Supp. at 1386. The Court went on to state, however, at 1387

> "If *Bivens* were to provide a cause of action to this plaintiff, the question of sovereign immunity in this

action against the United States would be one of considerable difficulty. While many state courts have abolished state law doctrines of sovereign immunity, see e.g., Bd. of Cmsrs. of the Port of New Orleans v. Spendour Shipping & Entertaining Co., Inc., La., 273 So.2d 19, this Court is not free to abolish the federal doctrine of sovereign immunity. Though the federal doctrine has been much criticized as having little foundation in the history of Anglo-Saxon jurisprudence and little support in public policy considerations, it has not been abolished by the Supreme Court. See C. Jacobs, The Eleventh Amendment and Sovereign Immunity (1972)."

The government contends it is shielded from liability by its sovereign immunity because it has not consented to a suit in damages based upon deprivation of a constitutional right. The plaintiff argues that the doctrine, which is nowhere affirmatively expressed in the Constitution cannot be used to immunize the government from liability in damage actions based upon violations of express prohibitions of the document. *See also* Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv.L.Rev. 1532, 1554-1559. Obviously this must be resolved before we can proceed further.

The judicial development of the doctrine of the sovereign immunity of the United States has been the subject of extensive analysis and criticism that need not be repeated here. *See generally* Hart & Wechsler, The Federal Courts and the Federal System 1339-1351 and N 1 (2d ed. 1973); Note, Developments in the Law—Remedies Against the United States and Its Officials, 70 Harv.L.Rev. 829 (1957). Whatever its origin and however indefensible in logic or equity its rationale, the principle that the federal government is immune from suit without its consent is

one which the Supreme Court has too frequently and too recently repeated to be questioned as controlling law.[1]

Plaintiff contends that she does not seek the abolishment of the doctrine, although the bulk of her brief is devoted to forceful and persuasive argument and quotation which attack the basis for the doctrine as it is generally applied. Rather plaintiff contends that her position is the more limited one that the doctrine has no application where a claim is based directly upon the Constitution. This argument has much initial appeal, yet in actuality its appeal rests on its attack of the same flawed logic and unfair results that undermine the concept of sovereign immunity in toto. Plaintiff is unable to marshall any support for her position that claims based directly upon the Constitution should be treated differently from those claims which arise under federal statutes or by virtue of the Federal Tort Claims Act. Her distinction is unworkable. Indeed the argument could be made that all claims based upon federal statutes are also "constitutional" claims since they trace their source through a congressional enactment which in turn must find its basis in the Constitution.[2] To apply plaintiff's analysis might thereby result in the back-door abrogation of the doctrine of sovereign immunity.

Similarly, the Court finds no support for plaintiff's position in *Bivens* itself. In *Bivens* the Supreme Court did no more than recognize that the Constitution itself gives rise to a federal cause of action in damages which

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[1] *See, e.g., Affiliated Ute Citizens of Utah* v. *United States,* 406 U.S. 128, 141-142 (1972); *Honda* v. *Clark,* 386 U.S. 484, 501 (1967) (dictum); *Dugan* v. *Rank,* 372 U.S. 609, 620-621 (1963); *Feres* v. *United States,* supra, at 139 and n.7; *United States* v. *Sherwood,* 312 U.S. 584, 586 (1941); *United States* v. *Shaw,* 309 U.S. 495.

[2] For example, compare the *Bivens* tort concept to 28 U.S.C. §A83 [*sic*] which statutorily creates the analogous cause of action as against state officials. *See, e.g., Munroe* v. *Pape,* 365 U.S. 167 (1961).

could be maintained in federal court against persons violating its terms under color of federal law. One pre-*Bivens* commentator, in urging this result, claimed that such a ruling would do no more than to accord those constitutional interests not elsewhere codified by Congress the status of "ordinary" law. Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in *Bell* v. *Hood,* 117 U.Pa.L.Rev. 1, 40 (1968). Recognition of such constitutional torts does not, of itself, have any effect on the government's sovereign immunity. *See Bivens, supra* at 410 (Harlan, J., concurring in judgment). *Cf. Monroe* v. *Pape,* 365 U.S. 167 (1961); *Katz, supra,* 117 U.Pa.L.Rev. at 5.

This Court has been unable to find any support for plaintiff's position that constitutional claims must hold a unique status requiring the conclusion that the government has no sovereign immunity in this "area" alone. As discussed above, this "area", is an amorphous one whose boundaries are not readily perceived. The Court is rather convinced that plaintiff's argument on its merits applies with equal force and logic to the entire concept of sovereign immunity and thus does not call for special treatment for claims against the federal government which find their basis in the Constitution.

> "Dissatisfaction with the law of municipal immunity does not rest solely on the illogic of the distinctions made in the area. It stems further from discontent with the whole concept of a broad sovereign immunity in tort, whether for local, state or national governments. Few doctrines in the law have sustained such voluminous, searching and nearly unanimous attack as the principle that governments should not respond in damages for their torts. The principle has been examined and found without basis in history properly

> interpreted, in political theory, or in sound public policy.
>
> The notion that governmental immunity in tort properly derives from the English common law principle that "the King can do no wrong" has been shown to rest on an erroneous reading of history. The notion that public funds are not collected for the purpose of redressing official wrongdoing, and hence cannot be expended for that purpose, rests on the same circular and specious logic which has been rejected by the courts in the area of charitable immunity. And finally the bald policy conclusion that 'it is better that an individual should sustain an injury than that the public should suffer an inconvenience' runs counter to both the traditional tort principle that *vis-a-vis* the innocent victim the wrongdoer should pay, and modern tort concepts of risk distribution and cost allocation.
>
> When in the course of performing their functions governments lawfully acquire goods and services, they are expected to pay the costs. No one has ever given an adequate argument why the same governments should not *a fortiori* pay the same costs when in performing the same functions they wrongfully injure innocent people."
>
> *Spencer* v. *General Hospital of District of Columbia,* 425 F.2d 479, 486-487 (D.C.Cir. 1969) (Wright J., concurring).

I can do no more than echo Judge Wright's observations quoted above. A grave injustice is worked here by the government's escape from liability. No citizen can take comfort in the enforcement of a doctrine which deems the fiscal integrity of our nation as more worthy of protection than the liberties upon which the republic was founded. This Court, however, cannot ignore the continued viability of the doctrine nor can it abolish it. As a result, the Court

must find that the government's defense of sovereign immunity is a complete bar to this action and award judgment for the defendant.

It is so ordered.

(s) FREDERICK R. DECESARIS
Chief Deputy Clerk

Enter:

(s) RAYMOND J. PETTINE
Chief Judge 8/14/75

United States Court of Appeals
For the First Circuit

No. 73-1294.

MARY JANE R. JAMES, ADMINISTRATRIX
OF THE ESTATE OF HOWARD JAMES,
PLAINTIFF, APPELLANT,
v.
UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

Before COFFIN, *Chief Judge,*
ALDRICH and CAMPBELL, *Circuit Judges.*

MEMORANDUM and ORDER
Entered December 5, 1973

The present record allows us to consider only the application and continued viability of *Feres* v. *United States,* 340 U.S. 135 (1950) but not the issue of the supposed relevance of *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971). We are prevented, by the denial of a post-judgment motion to amend the complaint, and by the absence of such evidence and findings as to negligence and causation as might have been relevant to the issue sought to be tendered, from considering whether or not "a constitutional tort" had been committed, and, if so, whether an action based thereupon may be brought, either under the Federal Tort Claims Act, notwithstanding *Feres,* or independently of such Act, notwithstanding the traditional defense of sovereign immunity.

Although the court may have been legally correct in denying the amendment, appellant, with some equity, urges that at least the record in this case be such as to permit her to seek a petition for certiorari which could embrace these

wide-ranging issues. Appellant has suffered the loss of her son and her substantive legal obstacles loom large enough without our adding procedural barriers to her attempt to preserve issues she deems important.

Without, therefore, suggesting that we disagree with the district court's ruling on the merits of the unamended complaint, or that we support the theory of the proferred amendment, we vacate the order of the district court and remand the case for the limited purpose of completing the record by allowing the amendment to the complaint, taking any additional evidence germane to the issues raised thereby, and making such factual findings and legal conclusions as this court deems appropriate. No costs at this time.

By the Court:

(s) DANA H. GALLUP

Clerk.

UNITED STATES DISTRICT COURT
D. RHODE ISLAND

Civ. A. No. 4670.

MARY JANE JAMES, Administratrix of the Estate of Howard James

v.

UNITED STATES OF AMERICA

Leonard Decof, and Max Wistow, Providence, R.I., Moses Kando, Pawtucket, R.I., for plaintiff.

Lincoln C. Almond, U.S. Atty., Everett Sammartino, Asst. U.S. Atty., Providence, R.I., Stephen P. Refsell, U.S. Navy, Quonset Point, R.I., for defendant.

OPINION

May 25, 1973.

PETTINE, *Chief Judge.*

This non-jury death action was brought under the Federal Tort Claims Act (F.T.C.A.), 28 U.S.C. §§ 1346, 2671, et seq., by the administratrix of the estate of Howard Harrison James, Jr. At the time of his death Howard James was a member of the United States Navy, stationed at Quonset Point, Rhode Island, under arrest and in the custody of the security guard. The action is based on the alleged negligence of the government in failing to train the security personnel, in failing to use due care to provide protection for the decedent while he was under arrest, and in assigning one Curtis Taylor as a member of the security force.

On August 14, 1969 the decedent James, while on the post on leave and in civilian dress, was arrested by Lt. Commander Charles R. Foster, the Command Duty Officer in charge of base security. James was taken to the guard house to be formally charged with disorderly conduct and then to be transported to the dispensary for a sobriety test.

In the guard house, Curtis Taylor, a black security guard, was instructed by Foster to execute these orders. Taylor approached James, who was attempting to make a telephone call, and grabbed the phone from James' hand and slammed it down on the cradle. Taylor then ordered James to go to a passageway and "stand by." Present in the guard house at this time in addition to James, were Taylor and two other guards, Robert Goodchild and Mervin Dubree. Each has his own version of what happened.

Dubree stated that the decedent in complying with the order to move to the passageway said "Remember I'm white—I'm not black." At that time Dubree was standing in front of James, facing him. Dubree remembers seeing a hand come over his shoulder striking James in the area of the face and throat. A fight then started. Dubree grabbed James in a "full nelson"—that is, from the rear, he placed his arms under the decedent's arm pits and laced his fingers in the nape of James' neck, thrusting the decedent's head forward, thus completely subduing him. Dubree stated that "first thing [he] knew Taylor had a night stick and hit [the decedent] across the face." James went limp. Dubree, still holding James, then saw a second blow with the night stick coming. In ducking out of the way, Dubree lost his grip on James. James fell to the floor. Nevertheless, Taylor continued to strike hard blows on James' head. He did this "2, 3, 4" times. Dubree further testified that he said to Taylor "That's enough" and tried to stop Taylor. He was unable to do so. Taylor jabbed him with his elbow knocking him backwards. He also remembered seeing Taylor "do something" with his foot to James and saying "Yes—I'm black." Two days later James died as a result of these injuries.

Taylor testified that while in custody James started "mouthing off" racial remarks and when told to stand by said he wasn't going any place with any "nigger." Taylor

said that as he tried to grab James, he [Taylor] was punched and knocked to the floor. This happened three times. On the third time, as he was getting up, he grabbed a night stick from Goodchild's hand and swung it at James. Taylor testified that he has no recall of what happened after that. He further testified he had no intention of hurting James nor of using any "techniques" on him with the night stick.

Goodchild's account is similar to Taylor's excepting for certain additional facts. He states that James was given the order "All right, let's go," and that after James made the comment of not going with a "nigger," Taylor grabbed him by the collar. It was at this point James first punched Taylor. Dubree tried to get a full Nelson on James as Goodchild was trying to grab him around the head while at the same time pushing his night stick into James' back. It was this night stick that Taylor grabbed. He saw Taylor strike James three times with the night stick; once across the face and twice on the head while he was on the floor. He further stated "Then Taylor stomped [James] . . ." three or four times on the head and said " 'I'm black, you're white. I'm tired of being black,' and then threw the night stick down and walked out of the office." After all this James got up—"There was blood all over the place and when he got up his hands were covered with blood so he got blood all over the walls and fell down back."

When Goodchild was asked if he could have stopped Taylor from "further hitting James" he answered, "I understand that Taylor went too far and I am pretty sure I know when he should have stopped. I am not saying that James didn't need subduing, because he did need to be subdued, but I feel I knew when, you know, when they went too far." He stated he felt that point was after the second blow and that he could have stopped Taylor after

that but he did not because Taylor was superior in rank and therefore could not be questioned.

Though not alleged in the complaint the plaintiff seeks to show negligence premised on the failure of the government to adequately train personnel assigned to security. In the course of the trial counsel for the plaintiff emphasized the lack of special instructions to the security personnel in the use of a night stick. The facts in this regard need not be labored. It is clear no specialized training was given nor any effort made by the Navy to screen personnel best suited for such duty. Men were assigned to security duty at random and if any instructions were received that they were given "on the job." These were far from adequate. Furthermore, as Lt. Commander Feeney, the Security officer in charge, stated proper training requires formal schooling.

Taylor testified that though assigned to the security section for approximately 16 months he received no special or formal instructions as to the conduct of his duties and more especially as to the use of a night stick. However, he did acknowledge that in conversation with other men it was stated it should never be used to strike any bony part of the body.

The night stick is a typical police club made of a round solid piece of wood 22 inches long. It is of such obvious rigidity and weight one needs no expertise to know that using any reasonably hard force in swinging such an instrument against a human skull will fracture it.

Applying these facts to the plaintiff's formal allegations as embodied in the complaint plaintiff asks this Court to decide whether, "The defendant, through its servants and agents, failed to use due care and negligently failed to provide the proper protection for the decedent while he was under arrest and in custody of the security police," and whether, "The defendant, through its servants and

agents, failed to use due care and negligently and carelessly permitted the said Curtis C. Taylor to carry out his attack on the decedent while the said decedent was unarmed and unable to protect himself. The senior petty officer and the officer in charge were negligent in failing to take appropriate steps under the circumstances to prevent the attack by the said Curtis C. Taylor when appropriate and timely action by the senior petty officer and the officer in charge would have prevented the said attack upon the decedent." There is a further allegation that Taylor may have had racist tendencies. This need not be considered for lack of any supportive evidence.

I do find that Taylor used unreasonable and excessive force in subduing James and this resulted in James' death. I find that Goodchild could have stopped or mitigated Taylor's blows after the second blow was given. I accept as true Goodchild's reason for not interfering: deference to a ranking officer.

What is exceedingly difficult is in determining whether government negligence caused the conditions which caused the death. There is little evidence of direct causal connection between the asserted negligence of the United States and the death. Indeed, I suppose such a causal connection is quite difficult to firmly establish. Although it seems that any person of reasonable intelligence would know that serious injury would result from hitting a man over the head with a night stick, I find it vexing that no training was given the security personnel. Taylor lost control of himself. Had he been trained he might have retained his self-control or used some non-lethal method of expressing his rage. In an age when police forces are often trained in how to properly respond to confrontations with abusive demonstrators, I must wonder what effect such training would have had on Taylor's behaviour.

Further, I find it difficult to know what responsibility to assign to the government for one of its military personnel not stopping blows rendered by another of its military personnel out of deference to rank, even though he knew the blows were going too far. Neither Taylor nor Goodchild acted with malice or in bad faith. Yet a man is dead.

Because of my disposition of this case, I make no further findings.

Conclusions of Law

[1] In Feres v. United States, 340 U.S. 135, 146, 71 S.Ct. 153, 159, 95 L.Ed 152 (1950), the Supreme Court held that "the Government is not liable for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." However harsh the results of applying the *Feres* doctrine to particular cases may be, *Feres* is still the law and must be applied here.

Plaintiff has argued that the *Feres* doctrine has been seriously eroded by subsequent Supreme Court decisions, namely United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963); Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L. Ed. 48 (1955), and United States v. Brown, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954).

[2] United States v. Muniz, supra, held that an inmate may sue to recover damages from the Government for personal injuries sustained during confinement in a federal prison by reason of the negligence of a government employee. The Government had argued that the Court should imply an exception to the F.T.C.A. for inmates' suits as it had done for military suits in Feres v. United States, supra. The Court found that the reasons underlying the *Feres* decision were not applicable to inmates' suits; that is:

> "(1) the absence of an analogous or parallel liability, on the part of either an individual or a State;

> no individual has power to mobilize a militia, no State has been held liable to its militiamen;
> (2) the presence of a comprehensive compensation system for service personnel;
> (3) the dearth of private bills from the military;
> (4) the distinctly federal relationship of the soldier to his superiors and the Government, which should not be disturbed by state laws; and
> (5) the variations in state law to which soldiers would be subjected, involuntarily, since they have no choice in where they go."

347 U.S. at 159, 83 S.Ct. at 1856.

Short shrift only need be made of plaintiff's argument that the facts of the instant case fall within *Muniz* and not *Feres*. The decedent James was a serviceman who had just been placed under arrest by military security personnel on a military installation. Cf. Shaw v. United States, 448 F.2d 1240 (4th Cir. 1971).

While the first reason for the *Feres* holding set forth in *Muniz* may well have been undermined by *Indian Towing Co., supra,* I do not find this to be the most important of the rationales for *Feres*. Of somewhat more weight is the focus thrown on the presence of an alternative compensation system by United States v. Brown, supra. On the facts of the case at tbar, the alternate compensation system has provided but a paltry remedy. Mrs. James received a little more than $1,000 for the death of her son in a government "gratuity" payment.[1]

What plaintiff has been unable to counter is the concern in *Feres* over the unique relationship of a serviceman to his superiors. Plaintiff has argued that there were no significant military discipline interests involved in the facts

[1] This does not include the monies she received as beneficiary under her son's military life insurance policy.

of this case. In Hall v. United States, 451 F.2d 353 (1st Cir. 1971), the First Circuit Court of Appeals rejected the argument that *Feres* is inapplicable in any case where military discipline is not involved. The argument as to discipline interests is irrelevant.

The contention that *Feres* has been seriously eroded has often been made and often rejected. See Schwager v. United States, 326 F.Supp. 1081 (E.D.Pa.1971). As to the applicability of *Feres* to the facts of the instant case, the fact that James was on leave does not distinguish *Feres*. James was on the military installation and under the jurisdiction of military security officers. "Even if a soldier is on leave or off duty . . . if the soldier is injured while under military jurisdiction, then he will be barred from suing the Government." Herreman v. United States, 332 F.Supp. 763, 766 (E.D.Wis.1971). See also Archer v. United States, 217 F.2d 548 (9th Cir. 1954); Hale v. United States, 334 F. Supp. 566, 570 (M.D.Tenn.1970); Coffey v. United States, 324 F.Supp. 1087 (S.D.Cal.1972), affd., 455 F.2d 1380 (9th Cir.1972).

[3] While on the Quonset Point Naval Air Station, decedent James was apprehended by naval security personnel for causing a public disturbance. He was arrested and taken to the base security office. He was under orders and about to be taken to the base dispensary for a sobriety test when the incident from which his injuries came occurred. On these facts I find that James injuries arose out of or were in the course of activity incident to service and that recovery against the government under the Federal Tort Claims Act is barred.

Because I find *Feres* to apply to the instant case, I do not reach the issues of whether the assault and battery exception to the F.T.C.A., 28 U.S.C. § 2680(h), or the discretionary function exception to the F.T.C.A., 28 U.S.C. §2680(a), would deny recovery under the F.T.C.A. here.

Cf. Gibson v. United States. 457 F.2d 1391 (3d Cir. 1972). Nor do I reach the question of whether Rhode Island law recognizes a cause of action against a government in negligence for failure to adequately train and control a police force,[2] assuming Rhode Island law to provide the relevant standard under 28 U.S.C. § 2674, but cf. United States v. Muniz, supra. 374 U.S. 164-166, 83 S.Ct. 1850.

I hold that the *Feres* doctrine bars recovery under the Federal Tort Claims Act in this case. This holding gives me little pleasure. An injustice has been done in this case and it ought to be remedied.

Following the trial in this matter, the Court discussed with counsel for both parties the possibility that the doctrine of Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 473 (1971) would provide a remedy based on the Constitution to this plaintiff. The Court asked if the parties would object to it seeking the assistance of an amicus skilled in federal jurisdiction and constitutional law. The United States objected and no amicus brief was sought. Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970).

In Bivens v. Six Unknown Fed. Narcotics Agents, supra, the Supreme Court held that a violation of the Fourth

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[2] Other jurisdictions have recognized such a cause of action: Carter v. Carlson, 144 U.S.App.D.C. 388, 447 F.2d 358 (1972), rev'd on other grounds sub nom District of Columbia v. Carter, 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed.2d 613; Thomas v. Johnson, 295 F.Supp. 1025 (D.D.C. 1968); Peer v. City of Newark, 71 N.J. Super. 12, 176 A.2d 249 (1961); McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960); Peters v. Bellinger, 22 Ill.App.2d 105, 159 N.E.2d 528 (1959); Meistinsky v. New York, 309 N.Y. 998, 132 N.E.2d 900 (1956); Fernelius v. Pierce, 22 Cal.2d 226, 138 P.2d 12 (1943). But cf. Davidson v. Kane, 337 F.Supp. 922 (E.D. Va.1972); Collins v. United States, 259 F.Supp. 363 (E.D.Pa.1966). Some support for such a cause of action may be found in the Restatement of Torts, 2d, section 319 and section 307. Generally, see II. Greenstone, Liability of Police Officers for Misuse of Their Weapons, 16 Cleve.-Mar.L.Rev. 397.

Amendment right to be free from unreasonable searches and seizures by a federal agent acting under color of his authority gave rise to a cause of action for damages based upon the unconstitutional conduct. The absence of a statutory cause of action for damages created by the Congress for this misconduct, did not, the Court held, prevent a federal court from providing a common judicial remedy, that of damages, for an invasion of Fourth Amendment rights. Mr. Justice Harlan, concurring in the judgment of the Court, thought that federal courts do have the power to award damages for violation of constitutionally protected interests but that this power is derived from the general federal question jurisdictional grant to the federal courts, 28 U.S.C. § 1331.

It had seemed to this Court that it could be argued that the application of unreasonable force by an untrained government police officer resulting in the death of one in custody could constitute a violation of the Fourth Amendment prohibition on unreasonable seizure, see Carter v. Carlson, supra, 447 F.2d at 363; of the Eighth Amendment procription against cruel and unusual punishment, see Howell v. Cataldi, 464 F.2d 272 (3rd Cir. 1972); and of the Fifth Amendment mandate against the deprivation of life without due process of law. Such claims might be within the scope of the *Bivens'* rationale. See United State ex rel. Moore v. Koelzer, 457 F.2d 892 (3rd Cir. 1972).

The protection of liberty, life, and property offered by the Fourth and Fifth Amendments is basic to our constitutional jurisprudence. These protections are found in the constitutional tradition of English law, which formed the background for our own Constitution, and can be traced back to the Magna Charta. Clause 39 of the Magna Charta provided that

> "No man shall be in any sort destroyed unless it be by the verdict of his equals, or according to the law of the land."
>
> Coke's Second Institute. Commentary on the Magna Charta, published in 1642 by order of the House of Commons, in Pound, The Development of Constitutional Guarantees of Liberty 148 (1957).

It would be peculiar indeed if Courts were able to imply remedies for statutory rights in securities laws, see J. I. Case v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964), but unable to provide an ordinary judicial remedy for invasion of rights protected by the supreme law, the Constitution, and basic in our scheme of liberties. See Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U.Pa.L.Rev. 1 (1968).

[4, 5] While money damages are indisputably among the traditionally available judicial remedies, it is true that the common law did not recognize actions for wrongful death. If, as *Bivens* holds, the source of the right sued upon is the Constitution, I would find it of little consequence whether in non-constitutional areas the cause of action is created by the legislature or existed at common law. The Constitution itself is silent about causes of action, yet must have implicitly meant for there to be remedies for violations of protected rights. See Hill, Constitutional Remedies, 69 Col.L.Rev. 1109, 1154 n. 193 (1969). Thus, I would find the fact that this is a wrongful death action to be no impediment to a cause of action for damages based on the Fourth and Fifth Amendments. What other sort of action could there be for violation of the constitutional prohibition against the taking of life without due process? A remedy in damages would be appropriate.

The *Bivens* Court did not decide the question of the

power of Congress to override a judicially created remedy, 403 U.S. at 407 n. 7, 91 S.Ct. 1999, or of the power of the courts to apply a traditional remedy in the face of Congressional restriction. The Supreme Court made no ruling on the question of immunity defenses, but remanded the case for further proceedings. Justice Harlan apparently thought the scope of the defenses available to be primarily a question of policy, 403 U.S. at 411, 91 S.Ct. 1999, but felt that a sovereign itself, aside from its agents remained immune from suit.

[6] If *Bivens* were to provide a cause of action to this plaintiff, the question of sovereign immunity in this action against the United States would be one of considerable difficulty. While many state courts have abolished state law doctrines of sovereign immunity, see e.g., Bd. of Cmsrs. of the Port of New Orleans v. Splendour Shipping & Entertaining Co., Inc., La., 273 So.2d 19, this Court is not free to abolish the federal doctrine of sovereign immunity. Though the federal doctrine has been much criticized as having little foundation in the history of Anglo-Saxon jurisprudence and little support in public policy considerations, it has not been abolished by the Supreme Court. See C. Jacobs, The Eleventh Amendment and Sovereign Immunity (1972).

One commentator has argued that the doctrine of federal sovereign immunity should not be allowed to bar a claim based on the Constitution. See Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1554-1559 (1972). Some support for this proposition might be found by extrapolation from one of the recognized exceptions to the sovereign immunity doctrine expressed in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949), that is, that the doctrine does not apply to cases where officers of the United States exercised their powers in a constitutionally

void manner. See Izaak Walton League v. St. Clair, 313 F. Supp. 1312, 1314 (D. Minn. 1970). At least two courts have been of the opinion that sovereign immunity does not bar relief against federal officers who violate plaintiff's Fourth Amendment rights, Bivens v. Six Unnamed Agents, 456 F.2d 1339 (2d Cir. 1972); De Masters v. Arend, 313 F.2d 79, 85 (9th Cir. 1963). It might also be argued that, like the taking of property without just compensation, the wrongful taking of life requires that some relief be given under the Constitution. See Malone v. Bowdoin, 369 U.S. 643, 648, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962); United States v. Lee, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882). In this regard I also note that the Court of Claims is given jurisdiction of claims arising from constitutional torts. 28 U.S.C. § 1491.

[7] There is no occasion to decide these troubling issues. Though given ample time and opportunity to do so, counsel for plaintiff has chosen not to amend the complaint to allege a constitutional tort of the *Bivens* variety. The complaint pleads only an action based on the Federal Tort Claims Act. Having chosen to proceed with this as exclusively a F.T.C.A. action, plaintiff is bound by her pleadings. For the reason stated within, this action cannot be heard under the F.T.C.A. Accordingly, it is ordered that judgment be entered for defendant.

APPENDIX B

Constitutional Provisions Involved

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Statutory Provisions Involved

28 U.S.C. § 2674

Liability of United States. — The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought in lieu thereof.

No. 75-1796

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARY JANE R. JAMES, ADMINISTRATRIX OF THE ESTATE OF HOWARD JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, the administratrix of the estate of a deceased United States Navy serviceman, instituted this action under the Federal Tort Claims Act seeking damages resulting from the serviceman's death. The death was caused by injuries inflicted by United States Navy security guards following decedent's arrest for disorderly conduct at the naval base in Quonset Point, Rhode Island, where he was stationed (Pet. App. A11). The district court dismissed the suit on the authority of *Feres* v. *United States*, 340 U.S. 135 (Pet. App. A11-A23).

On petitioner's first appeal, the court of appeals remanded the case to the district court "for the limited purpose" of permitting petitioner to amend her complaint to allege a constitutional tort (see *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388) and for the taking of any

evidence germane to the allegations of the amended complaint (Pet. App. A9-A10).[1] On remand, the district court concluded that no cause of action based on the theory of a constitutional tort could be maintained against the United States without its consent and that there had been no waiver of sovereign immunity to permit such a suit (Pet. App. A3-A8). The court of appeals, considering both causes of action, affirmed (Pet. App. A1-A2).

1. Petitioner's claim under the Federal Tort Claims Act, as the courts below recognized (Pet. App. A1, A18), is barred by *Feres*. In *Feres*, this Court held that Congress did not give consent for the United States to be sued under the Federal Tort Claims Act for the death or injury of members of the armed services sustained incident to their service, stating (340 U.S. at 146):

> [T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.

Petitioner seeks to avoid *Feres* by arguing (Pet. 6-8) that later cases have narrowed the scope of *Feres*,

[1]The district court had denied petitioner's post-trial motion to amend (Pet. App. A9).

making it applicable only to injuries "aris[ing] out of or in the course of military duty." *United States* v. *Brown*, 348 U.S. 110, 113; see *Hale* v. *United States*, 416 F. 2d 355, 358-359 (C.A. 6). Whatever may be the distinction between such injuries and "injuries [that] arise out of or are in the course of activity incident to service," if indeed any such distinction exits, it is of little avail to petitioner here. Her claim is based upon the death of a serviceman that occurred while he was on active duty on the military base at which he was stationed, and as the direct result of the actions of military security officers who had placed him under military arrest and who were exercising military discipline and control over him (Pet. App. A1, A11, A18). Thus the suit would be barred under either standard.

Alternatively, petitioner suggests (Pet. 5-6) that *Feres* should be reexamined. But the principles announced in *Feres* have been recognized law for more than 25 years. Congress is free to waive sovereign immunity as it desires, but it has made no effort legislatively to overrule the *Feres* decision. It would be inappropriate for this Court, having said that Congress did not intend to create a cause of action against the United States in these cases by passage of the Federal Tort Claims Act, now to find such an intention despite 25 years of subsequent congressional acquiescence. If harsh results are thought to occur from this doctrine, the remedy lies with Congress and not this Court.[2]

2. Petitioner's cause of action against the United States alleging violations of the serviceman's constitutional rights (Pet. 8-13) stands on no better footing.

[2]The Court in *Feres* expressly noted that "if we misinterpret the Act, at least Congress possesses a ready remedy" (340 U.S. at 138).

With regard to the necessity of a waiver of sovereign immunity before a suit may be entertained, there is no distinction between common law or statutory causes of action and constitutional causes of action. *Duarte* v. *United States,* 532 F. 2d 850, 851-852 (C.A. 2). Cf. *United States* v. *Testan,* 424 U.S. 392, 401-402. Under *Feres,* sovereign immunity has not been waived, regardless of whether the tort alleged is defined by common law, statute, or the Constitution.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.